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No. 99 - 689

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

TERRY L. STEWART, Director, Arizona Department of Corrections,
Petitioner,

v.

JAMES GRANVIL WALLACE, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, DELAWARE, GEORGIA, KANSAS, MISSOURI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, OREGON, PENNSYLVANIA, TENNESSEE, UTAH, AND WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

Did the Ninth Circuit err in holding, contrary to *Strickland, Teague,* and decisions by other circuit courts of appeal, that claims of ineffective assistance of counsel in the guilt and sentencing phases of a capital case are subject to different standards of review and that defense counsel had a duty in a capital sentencing proceeding to investigate and provide facts to the examining mental health experts that those experts did not request?

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INTEREST OF AMICI CURIAE

The amici states are responsible for defending presumptively valid death penalty judgments against federal habeas corpus challenges. They have a compelling interest in the finality of such judgments and in ensuring that the limited role of federal courts when reviewing collateral claims be respected. The well-established requirement of restraint on habeas review is particularly important when considering allegations of ineffective assistance of trial counsel. The opinion of the Ninth Circuit Court of Appeals in this case completely ignores the "significant limits on the discretion of federal courts to grant habeas relief" imposed by this Court. *Calderon v. Thompson*, 118 S.Ct. 1489, 1500 (1998). Indeed, the circuit court has imposed broad new mandatory duties on defense counsel, which are both inconsistent with the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and overlook the "rule of contemporary assessment of counsel's conduct" mandated by this Court. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Specifically, the circuit court concluded

in direct contradiction of *Strickland* that claims of ineffective assistance by trial counsel in the sentencing phase of a capital case should be considered under different standards from those applicable to the guilt phase or any noncapital trial. The requirements mandated by the circuit court violate the prohibition against creating new rules on collateral review, *Teague v. Lane*, 489 U.S. 288 (1989), and undermine the finality of innumerable death judgments. Amici urge the Court to grant certiorari in order to review these issues.[1]

REASONS FOR GRANTING THE WRIT

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding . . . ." *Fretwell*, 506 U.S. at 370. Thus, a state prisoner challenging trial counsel's action must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland*, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential," *id.* at 689, and must ultimately focus on whether the result of the trial was unreliable or the proceeding was fundamentally unfair. *Fretwell*, at 372.

The Ninth Circuit opinion in this case acknowledges none of the restraints imposed by this Court on federal court collateral review of presumptively final state judgments and all but ignores this Court's decisions on ineffective assistance of

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1. Arizona also seeks certiorari on the Ninth Circuit's grant of an evidentiary hearing based on evidence presented by Wallace for the first time in federal court. Amici agree that the opinion below conflicts with other circuits and endorse the arguments presented by Arizona in the Petition For Writ of Certiorari.

counsel. The Ninth Circuit reversed this capital judgment by concluding: (1) that ineffective assistance claims relating to the sentencing phase of a capital case should be judged by different standards from those applicable to guilt phase representation; (2) that trial counsel has a duty to obtain and present to expert witnesses information that might assist their evaluation even if not requested to do so by the expert; and (3) that the discovery of any additional mitigation after trial is sufficient to establish ineffective assistance based on trial counsel's failure to uncover and present it. *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999). The Ninth Circuit's holdings defy the decisions of this Court and constitute new rules within the meaning of *Teague*.

A. Ineffective Assistance of Counsel Claims Are Governed By The Same Standard In All Phases of a Capital Trial

Prior to this Court's decision in *Strickland*, there was some suggestion that claims of ineffective assistance of counsel in the sentencing phase of a capital case should be judged under more rigorous standards than those applicable to review of noncapital cases or even to the guilt phase of a capital case. *See* Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299 (1983). The Court firmly rejected that suggestion: "A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision [citations omitted] that counsel's role in the proceedings is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." 466 U.S. at 686-687.[2] Since *Strickland*

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2. Indeed, the Court left open the question of whether it might apply a different, presumably less rigorous test, to claims of ineffective assistance in "ordinary sentencing" proceedings. 466 U.S. at 686; *see Caspari v. Bohlen*, 510 U.S. 383, 393 (1994).

the few courts to comment have recognized that the "standards for determining whether counsel has been ineffective in a capital sentencing proceeding are identical to the standards for the guilt phase of the trial." *Flamer v. State of Delaware*, 68 F.3d 710, 732 (3d Cir. 1995); *see also Collier v. Turpin*, 177 F.3d 1184, 1198 (11th Cir. 1999) (the two-part test of *Strickland* "applies to claims of ineffective assistance during the sentencing phase as well as the guilt phase of the trial"); *Groseclose v. Bell*, 130 F.3d 1161, 1167 (6th Cir. 1997) (quoting *Strickland* language).

Ignoring this Court's express holding, the Ninth Circuit adopted its own approach to evaluating challenges to counsel's representation during capital sentencing proceedings. It held that while trial counsel was not obligated to investigate and bring to the attention of mental health experts information about the defendant's background unless requested to do so by an expert during guilt phase preparation, such a duty did apply at the sentencing phase of a capital case. *Wallace v. Stewart*, 184 F.3d at 1116. In short, the Ninth Circuit held that trial counsel's duty of investigation in the guilt phase is different from the duty to investigate in the penalty phase of a capital case. The sole authority cited to support such disparate requirements was two prior opinions of the Ninth Circuit. *See*, *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995); *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied* 119 S.Ct. 2414 (1999).[3] Because the "relevant precedent" from this Court, *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997), did not compel the rule adopted by the Ninth Circuit—indeed, such

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3. Although *Caro* did, improperly, draw a distinction between the duties of trial counsel in the guilt and penalty phases of a capital trial, *Hendricks* cannot reasonably be read to support such a rule. Amici recognize that a circuit court's misapplication of its own precedent does not justify review by this Court. We make this point simply to demonstrate the utter lack of support for the Ninth Circuit's rule.

precedent affirmatively precluded the circuit court's conclusion—the rule stated violates the retroactivity principle of *Teague*. *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997).

Aside from its failure to follow *Strickland*, the Ninth Circuit's holding assumes that trial counsel's preparation for the guilt and sentencing phases of a capital case can be neatly separated. It cannot. "A lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase." *Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999). Thus, counsel's pretrial investigation and preparation has to be considered as a whole. The information obtained with respect to one aspect of the case will necessarily influence counsel's "reasonable professional judgment" on how to proceed with other portions. *See Burger v. Kemp*, 483 U.S. 776, 794 (1987) (counsel reasonably concluded on basis of initial interviews not to undertake additional investigation into defendant's past for possible mitigation evidence). The Ninth Circuit's opinion ignores these principles.

B. Trial Counsel Is Not Obligated To Investigate For Or Present Information To An Expert Witness Unless Requested To Do So By The Expert

The Ninth Circuit held that at the penalty phase of a capital case defense counsel has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request[.]" *Wallace*, 184 F.3d at 1116. The court relied entirely upon its own precedent to reach this conclusion. *See Caro*, 165 F.3d at 1226-1228.[4] As explained in the Petition for Writ of

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4. The circuit court has since relied in part upon *Caro* to reverse another Arizona capital case because trial counsel did not independently provide information to experts. *See Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999).

Certiorari, Pet. at 10-11, the Ninth Circuit was forced to rely on its own precedent because there is no support for the court's conclusion in any decision of this Court or the other circuits. At least one court reached precisely the opposite conclusion. *Hill v. Moore*, 175 F.3d 915, 926 (11th Cir. 1999) ("we cannot conclude that counsel were deficient for failing to provide their expert witness with information that, if it existed, the witness was in a position to discover"); *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990) (trial counsel was not obligated to "track down every record that might possibly relate to Card's mental health and could affect a diagnosis" by his experts). Indeed, until it bifurcated ineffective assistance claims in capital cases, the Ninth Circuit had expressly rejected any notion that trial counsel were obligated to uncover and present information to experts unless asked to do so. *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997); *Hendricks v. Calderon*, 70 F.3d at 1038.

The impracticality of the rule established in this case was aptly demonstrated by the Ninth Circuit itself in *Hendricks* : "To impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation." 70 F.3d at 1038. Simply put, counsel are entitled to rely on the opinions of experts hired to assist with the investigation. *See, e.g.*, *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998). That reliance is as appropriate in preparation for the sentencing phase of a capital trial as in any other aspect of an attorney's representation. Counsel is not required to second-guess the opinions offered by an expert nor is the attorney obligated to know more than the expert or to be independently aware of what information might assist an expert's evaluation of the defendant. The Ninth Circuit's conclusion that counsel should,

in fact, possess such clairvoyance is unsupported by any authority from this Court.

The per se requirement established in this case is a "long step down the path that leads to the courts' laying down a rigid protocol that criminal defense lawyers must follow if they are to escape being later deemed ineffective." *Thomas v. Gilmore*, 144 F.3d 513, 516 (7th Cir. 1998). Such an approach, however, is entirely inconsistent with this Court's recognition that there are "countless ways to provide effective assistance of counsel in any given case." *Strickland*, 466 U.S. at 689; *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (courts must be careful "not to narrow the wide range of conduct" acceptable under the Sixth Amendment). Apart from the circuit conflict it creates, the Ninth Circuit's imposition of new duties on trial counsel violates *Teague* and warrants review by this Court.[5]

C. The Discovery Of Additional Potential Mitigating Evidence In Posttrial Proceedings Does Not Establish Ineffective Assistance Of Counsel

In *Strickland* the Court "adopted the rule of contemporary assessment of counsel's conduct . . . ." *Fretwell*, 506 U.S. at 372. That is, the reasonableness of counsel's actions must be assessed as of the time of trial rather than in reliance upon "second guessing with the benefit of hindsight." *White v. Singletary*, 972 F.2d 1218,1220 (11th Cir. 1992); *see also Coe*

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5. The circuit court also suggested that failure by an expert to make a proper inquiry into the defendant's background might violate *Ake v. Oklahoma*, 470 U.S. 68 (1985). 184 F.3d at 1118 n. 7. Every court to consider that argument, including the Ninth Circuit, has found it barred by *Teague*. *See, e.g., Harris v. Vasquez*, 949 F.2d 1497, 1518-1522 (9th Cir. 1990). Reframing the issue as one of ineffective assistance of counsel does not overcome the *Teague* problem. *Cf. Thomas v. Taylor*, 170 F.3d 466, 472 (4th Cir. 1999) (rejecting effort to "recast" claim of ineffective expert as claim of ineffective assistance of counsel).

v. Bell, 161 F.3d 320, 342 (6th Cir. 1998) (court should consider "the adequacy or inadequacy of counsel's actual performance, not counsel's (hindsight) potential for improvement"). Quite simply, the focus is "not upon whether counsel could have done a better job, but upon whether counsel provided the assistance necessary to ensure the fundamental fairness of the proceeding whose result is being challenged." *Resnover v. Pearson*, 965 F.2d 1453, 1460 (7th Cir. 1992). Once again the Ninth Circuit violates these basic limitations on review of ineffective assistance claims.

The circuit court decision is premised in part on an assumption that the discovery of "new" expert opinions during posttrial proceedings indicates that trial counsel was ineffective for not uncovering the same information. That assumption is in turn is driven by the court's apparent belief that the presentation of mental health evidence is an essential component of any penalty phase defense. *See* 184 F.3d at 1113 (the "bizarre circumstances of the crime suggest that Wallace may have been acting as a result of some mental infirmity, which might have constituted a mitigating circumstance"). This assumes, of course, that defendants are likely to benefit from efforts to explain brutal behavior through expert testimony. *See, e.g., Burris v. Parke*, 116 F.3d 256, 260 (7th Cir. 1997) ("jurors may not be impressed with the idea that to know the cause of viciousness is to excuse it"). In any event, a finding of ineffective assistance based on the development of new evidence long after trial violates the contemporary assessment rule.

The fact that a condemned inmate is able to uncover experts willing to testify on his behalf years after the trial is neither significant nor surprising. *See Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring). Given that "'[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most cases,'" *Medina v.*

California, 505 U.S. 437, 541 (1992), the existence of new or additional expert opinions cannot establish that counsel was ineffective at the time of trial. At most it demonstrates that various experts "simply arrived at a different conclusion, which is not surprising." *Brewer v. Reynolds*, 51 F.3d 1519, 1526 (10th Cir. 1995). More importantly, the Ninth Circuit's reliance on new experts to establish ineffective assistance ignores the admonition set forth in *Strickland*, *Burger*, and *Fretwell* to examine what counsel actually did at the time of trial and determine from that examination the objective reasonableness of counsel's actions. As demonstrated by Arizona, *see* Pet. at 13-15, the Ninth Circuit's approach is inconsistent with numerous cases from other circuits.[6]

The state trial is the "'main event,'" *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), while habeas corpus review is "secondary and limited." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Moreover, the states have a "compelling" interest in the finality of their criminal judgment. *Calderon v. Thompson*, 523 U.S. at 1501. Under the rule adopted by the Ninth Circuit no state death judgment can ever be truly final so long as habeas counsel can uncover any new arguably mitigating evidence. The opinion below is yet another example of the "'death is different' time warp," *Dobbs v. Zant*, 506 U.S. 357, 363 (1993) (Scalia, J., concurring in judgment), and further erodes respect for state court judgments.

By focusing on what habeas counsel have uncovered years later rather than considering what was actually done at the time of trial, the Ninth Circuit ignores the limitations of its federal

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6. These concerns are exacerbated when a federal court bases its decision on evidence never presented to the state courts, as demonstrated by the second ground upon which Arizona seeks certiorari review.

habeas corpus jurisdiction. "Collateral review is not a *repechage* round in which the loser in one system of courts starts from scratch in another." *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1993). Certiorari should be granted in order to restore the proper balance to federal court review of challenges to state trial counsel.

CONCLUSION

For the reasons stated above amici respectfully request that this Court grant the petition for writ of certiorari.

Dated: November 18, 1999.

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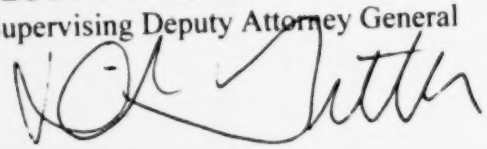

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CERTIFICATE OF SERVICE BY MAIL

DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 11000, in the City and County of San Francisco, State of California; that on November 19, 1999, he served three true copies of the Brief of Amici Curiae States of California, Alabama, Delaware, Georgia, Kansas, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, and Washington in Support of Petition for Writ of Certiorari in the above-entitled matter on the respondent and by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

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